# In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

*v.*

SHAWN E. EICHMAN, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

*v.*

MARK JOHN HAGGERTY, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON*

## BRIEF FOR THE SPEAKER AND LEADERSHIP GROUP OF THE U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF JURISDICTIONAL STATEMENTS

**STEVEN R. ROSS** (Counsel of Record)
*General Counsel to the Clerk*

**CHARLES TIEFER**
*Deputy General Counsel to the Clerk*

**MICHAEL L. MURRAY**
*Senior Assistant Counsel to the Clerk*

**JANINA JARUZELSKI**
*Assistant Counsel to the Clerk*

**ROBERT MICHAEL LONG**
*Assistant Counsel to the Clerk*

*The Capitol, H-112*
*Washington, D.C. 20515*
*(202)225-9700*
*Attorneys for Speaker and Leadership Group of the House of Representatives.*

MARCH 1990

## QUESTION PRESENTED

Whether an Act of Congress protecting in a content-neutral fashion the physical integrity of the flag is constitutional as applied to the hauling down and burning, accompanied by violence, of a flag denominating a United States facility.

# TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Interest of the Amici Curiae | 1 |
| Statement | 2 |
| The Question is Substantial | 7 |
| Conclusion | 11 |


## TABLE OF CASES AND AUTHORITIES


| | |
|---|---|
| *Cases:* | |
| *American Foreign Service Assn.* v. *Garfinkel*, 109 S. Ct. 1693 (1989) | 2 |
| *Finzer* v. *Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *aff'd in part and rev'd in part on other grounds, Boos* v. *Barry*, 485 U.S. 312 (1988) | 9, 10 |
| *Halter* v. *Nebraska*, 205 U.S. 34 (1907) | 10 |
| *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983) | 2 |
| *Montoya* v. *United States*, 180 U.S. 261 (1901) | 9 |
| *Morrison* v. *Olson*, 108 S. Ct. 2597 (1988) | 2 |
| *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989) | *passim* |
| *United States Army Corps of Engineers* v. *Ameron, Inc.*, 109 S. Ct. 297 (1988) | 2 |
| *United States* v. *William Charles Cary, Jr.*, No. 88-5458 (8th Cir. filed Feb. 26, 1990) | 7, 9, 10, 11 |
| *United States* v. *Helstoski*, 442 U.S. 447 (1979) | 2 |
| *United States* v. *Maine*, 475 U.S. 89 (1986) | 9 |
| *Legislative Materials and Statutes:* | |
| 18 U.S.C. § 700(a) (1) and (2) | 5 |
| 18 U.S.C. §§ 1361-62 | 5 |
| Pub. L. No. 101-131, 103 Stat. 777 (1989) | 3 |

*Legislative Materials and Statutes—Continued* Page
*Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Sen. Comm. on the Judiciary*, 100th Cong., 1st Sess. 119 (1989) ..... 3
*Miscellaneous:*
Scalia, *Originalism: The Lesser Evil*, 57 Cinn. L. Rev. 849 (1989) ..... 8
B.W. Tuchman, *The First Salute* (1988) ..... 9

# In the Supreme Court of the United States

OCTOBER TERM, 1989

---

No. 89-1433

UNITED STATES OF AMERICA, APPELLANT

*v.*

SHAWN E. EICHMAN, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

---

No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

*v.*

MARK JOHN HAGGERTY, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON*

---

**BRIEF FOR THE SPEAKER AND LEADERSHIP GROUP OF THE U.S. HOUSE OR REPRESENTATIVES IN SUPPORT OF JURISDICTIONAL STATEMENTS**

## INTEREST OF THE AMICI CURIAE

The Speaker and Leadership Group of the United States House of Representatives ("House *amici*") respec-

tively submit this brief as *amici curiae*, to provide an official defense of a challenged Act of Congress, the Flag Protection Act of 1989.[1] In response to *Texas* v. *Johnson*, 109 S. Ct. 2533 (1989), President Bush called for a constitutional amendment for flag protection. The Department of Justice testified it believed that *only* a constitutional amendment could protect the flag. While the Executive Branch's position appears to be somewhat modified before this Court, it is not the only official defense of the statute warranted in a case challenging the constitutionality of an Act of Congress.

For such cases, the Senate and House may provide an official defense. The Court has noted that "[w]e have long held that Congress is the proper party to defend the validity of a statute when [the Executive Branch argues] that the statute is inapplicable or unconstitutional." *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919, 923 (1983). The Speaker and Leadership Group of the House of Representatives have often done so. *See, e.g., American Foreign Service Assn.* v. *Garfinkel*, 109 S. Ct. 1693 (1989); *United States Army Corps of Engineers* v. *Ameron, Inc.*, 109 S. Ct. 297 (1988); *Morrison* v. *Olson*, 108 S. Ct. 2597 (1988); *United States* v. *Helstoski*, 442 U.S. 447 (1979). House *amici* presented a full defense of this Act in briefing and argument in the district court.

## STATEMENT

Last year, this Court struck down Texas' provision prohibiting "seriously offensive" desecration of venerated objects (including flags) in *Texas* v. *Johnson* as a non-neutral imposition on expressive conduct. The decision elicited a powerful reaction, fueled by President Bush's and

[1] For the purposes of this brief, the Leadership Group joining the Speaker consists of Majority Leader Richard A. Gephardt and Majority Whip William Gray III. Republican Leader Robert Michel and Republican Whip Newt Gingrich declined to join in this brief.

Counsel for the Defendants and the Solicitor General have consented to the filing of this brief. Their letters of consent are being lodged with the Clerk of the Court.



Attorney General Thornburgh's urging of a constitutional amendment.[2] The Administration's calls to alter, for the first time, the Bill of Rights presented Congress with the choice between enacting such a constitutional amendment to override the Court's decision in the *Texas* v. *Johnson* or amending the existing federal flag protection statute to bring it into compliance with that decision. Congress chose to comply. It conducted extensive hearings and received scholarly testimony regarding this Court's language in *Texas* v. *Johnson* which distinguished the government's legitimate interest in neutrally protecting the "physical integrity of the flag" from the illegitimate interests evidenced by non-neutral statutes, such as the Texas "serious offense" statute. Congress concluded that a statute could be drafted to comply with this Court's decision and therefore adopted the Flag Protection Act of 1989 ("Federal Flag Act" or "the Act"), Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. §700). The proposed constitutional amendment was deferred.

The new act went into effect on October 27, 1989. That day, a flier was circulated in Seattle announcing plans to conduct a rally called a "Festival of Defiance." At the appointed hour, a largely youthful mob assembled at the United States Post Office at 101 Broadway Street East, over which flew a flag owned by the United States government. Ensuing events were filmed, with a videotape that was part of the record below.[3] The leader of the

[2] "The President and I have endorsed the amendment proposed by Senators Dole and Dixon and Congressmen Michel and Montgomery." Letter from Attorney General Richard Thornburgh to Senator Strom Thurmond, July 31, 1989, reprinted in *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Sen. Comm. on the Judiciary*, 101st Cong., 1st Sess. 119 (1989).

[3] This appeal is taken from the district court's decision granting defendants' motion to dismiss Count II of the Information. The United States Attorney attached to the Information an affidavit explaining that postal inspectors and agents of the Federal Bureau of Investigation had been assigned to the announced disorders. Affidavit by Steven

Continued

action, defendant Mark Haggerty, lowered the Post Office's flag, and burned it, assisted by the defendants Carlos Garza, Jennifer Campbell, and Darius Strong.

As the eyewitness accounts and videotape show, see note 3, *supra*, the flagburning precipitated violent disorders:

> A group of individuals with shaved heads and green jackets with U.S. flags on the arm was taunted by the white male in black (on top of the Post Office roof). Pushing and shoving began amongst the crowd and some punches were thrown by unidentified individuals.
>
> Another unidentified individual brought a McDonald's flag to the front of the Post Office, which was also burned on the side of the wall of the Post Office building. . . .
>
> . . . Traffic was at a standstill, people were honking their car horns and yelling at the flag burners.
>
> An unidentified individual threw what appeared to be "tear-gas" into the crowd by the burning flag. Someone in the crowd stated that this was to prevent putting the burning flag out. The crowd ran from the burning flag and smoke.

Memorandum of Special Agent Steven M. Dean (November 2, 1989), *United States* v. *Haggerty*, No. CR89-315-R (W.D. Wash.), at 2. The videotape and accounts describe the injuries by those caught in the violence. See note 3, *supra*.

The United States filed an Information charging the defendants with two counts, both of which emphasized that the postal service flag was the property of the

---

M. Dean and Stan Pilkey (November 28, 1989), attached to the Information. The affidavit notes that "Postal Inspector John Buck was also present throughout the protest operating a video camera to record the event. Postal Inspector Buck produced a videotape which depicts portions of the protest." *Id.*, at para. 5. The agents supplemented their own videotape with film from television stations which covered the events. "A composite tape which consists of both the postal inspectors tape and the commercial news broadcasts is attached as Exhibit A." *Id.*, at para. 6.



United States. Count I charged that the defendants "did willfully injure or commit a depredation against property of the United States and an agency thereof, to wit, a flag of the United States, which was the property of the United States Postal Service," in violation of 18 U.S.C. §§ 1361-62. Count II charged that they "did knowingly burn a flag of the United States, to wit, the flag of the United States, which was the property of the United States Postal Service," in violation of 18 U.S.C. § 700(a)(1) and (2).

Defendants moved to dismiss Count II; without disputing the facts set forth by the prosecution, they asserted that the Flag Protection Act was unconstitutional as applied to those facts. They filed various post-hoc affidavits asserting linkages between their acts and political causes, none of which expressly justified, or even noted, defendants' own decision to burn a flag which was the property of the United States government.

The Justice Department, which has traditionally supported the constitutionality of flag protection statutes, has taken positions supporting the need expressed by President Bush and Attorney General Thornburgh for a constitutional amendment. It thereby failed to present Congress' position, set out at length in both the House and Senate committee reports on the bill, that the bill sought to comply with, rather to necessitate and overruling of, *Texas* v. *Johnson*. Accordingly, to provide the official defense of the statute comporting with the Congressional intent to comply, the Senate and House *amici* appeared in the case, by filing briefs defending the Act and presenting oral argument.

After hearing argument from the parties and the Senate and House *amici*, the district court struck down the Flag Protection Act as applied. In their briefs, the Senate and House *amici* had set forth how the particular language of the Flag Protection Act of 1989 derived from the sharply drawn contrast in *Texas* v. *Johnson* between a non-neutral statute (namely, the unconstitutional Texas

provision aimed at "seriously offensive" expression), and a neutral provision (namely, one "aimed at protecting the physical integrity of the flag in all circumstances"). 109 S. Ct. at 2543. House *amici* had shown how protection of the "physical integrity of the flag" accorded with the original intent of the Framers of the First Amendment, particularly James Madison, who considered protection of the flag as an incident of sovereignty, not a suppression of expression. This issue had not been decided in *Texas* v. *Johnson*, since the Texas provision turned on the non-neutral test of "serious offense" and since that provision was supported only by related interests in suppression of expression raised by Texas.

Faced with an Act of Congress premised upon this Court's pronouncements concerning the constitutionality of a statute neutrally "aimed at protecting the physical integrity of the flag," the district court, although fully apprised of the basis for enactment, refused even to decide the validity of that basis. It only spoke of that matter in a footnote, saying it would not reach the validity of that basis for enactment because "the Act fails to protect the flag's physical integrity"; the Act failed to fulfill its purpose of complying with this Court's language, the district court held, because "flying the flag in inclement weather *or carrying it into battle*, are not prohibited [by the Act]." Slip op. at 12 n.6 (emphasis supplied). Congress's decision to comply with *Texas* v. *Johnson* thus never even received judicial recognition because this Court's language was read as equating neutrality with forbidding the armed forces to carry the flag into battle—a suggestion without support in this Court's opinions, in the legislative history, or anywhere else.[4] The district court also took no step

[4] The suggestion that the government's admitted inability to protect, by statute or otherwise, the physical integrity of the flag against the ravages of either nature or war hardly can diminish the government's authority to protect the flag from the dangers that are within the province of governmental control. The statute does not condone the damage done to a flag in a storm by the forces of nature or, in a

Continued



toward considering the significance that the defendants destroyed a flag owned by the United States which denominated one of its facilities, and that they had thereby precipitated violence. From the district court judgment of dismissal, the United States noted its appeal.[5]

## THE QUESTION IS SUBSTANTIAL

*Texas* v. *Johnson* established that, in some circumstances, flagburning can be one of the forms of conduct considered expressive. The Texas provision in that case was singularly ill-suited for dealing with expressive conduct, since it singled out "offensive" expression. However, *Texas* v. *Johnson* does not prohibit every statute dealing with flagburning in every way. When Congress had to decide whether to grant President Bush's call for an immediate constitutional amendment to overrule *Texas* v. *Johnson*, it properly identified this Court's distinction between neutral and non-neutral flag protection statutes, and the difference in the interests behind them. Nothing in *Texas* v. *Johnson* requires, as the district court's judgment would, that every statute which protects the flag be struck down as non-neutral unless "carrying [the flag] into battle, [is] prohibited," slip op. at 12 n.6.

Moreover, the district court judgment here is in conflict with a recent decision of the United States Court of Appeals for the eighth Circuit upholding, after *Texas* v. *Johnson*, a federal flagburning prosecution on comparable facts. In *United States* v. *William Charles Cary, Jr.*, No. 88-5458 (8th Cir. filed Feb. 26, 1990), the defendant Cary burned a United States flag at an Armed Services Recruitment Center in Minneapolis, during another violent

battle, by a foreign enemy. It merely recognizes that neither weather nor the gunfire of an enemy at war with the United States are susceptible to statutory control.

[5] The facts and ruling in the District of Columbia case, *United States* v. *Eichman*, are set forth in the Justice Department's Jurisdictional Statement in that case. That district court largely followed the opinion of the Seattle district court, which may appropriately be considered the principal case.

confrontation. A district court convicted Cary for violating the federal flag protection act,[6] and the Eighth Circuit affirmed the conviction. It correctly explained that *Texas* v. *Johnson* did not invalidate all flag protection statutes, only those aimed at suppressing particular messages like the Texas provision. A statute with a different governmental interest still validly applies:

> Cary intended to convey his disagreement with the United States Government's decision to send 3,200 troops to Honduras. His means of communicating that message was the burning of the American flag. The government's interest in punishing Cary's violation of § 700 was to prevent further breaches of the peace which would likely result from the reaction of the vandals to Cary's means of communicating his message in the context of violence, not to the message itself. Cary's punishment is akin to a time, place and manner restriction, and not to a content-based restriction.

Slip op. at 12.

Congress legitimately had important governmental interests in mind, unrelated to suppression of particular messages, in following this Court's language regarding neutrally protecting the physical integrity of the flag. In the matter of flag destruction, an issue familiar to the Framers—flags being as combustible in the 1600s and the 1700s as now—the original intent of the Framers provides a valid means for determining whether the First Amendment as originally written allows for neutral flag protection, without any need for further amendment. *See* Scalia, *Originalism: The Lesser Evil*, 57 Cinn. L. Rev. 849, 864–65 (1989) (willingness to consult original intent is "a rather fundamental—indeed, *the* most fundamental—aspect of constitutional theory and practice"). The Framers considered the flag they adopted and sought to pro-

[6] The United States prosecuted Cary pursuant to 18 U.S.C. 700 in its form prior to amendment by the Flag Protection Act of 1989. The statutory amendment does not diminish the validity of the Eighth Circuit's reasoning as applied to the prosecutions of either Cary or Haggerty.



tect, apart from being merely a patriotic or any other type of symbol, as an incident of sovereignty. Sovereignty was, and remains, a primary concern of the government. "The word 'nation' as ordinarily used presupposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries and the power to enter into negotiations with other nations." *Montoya* v. *United States*, 180 U.S. 261, 265 (1901). Absent sovereignty and its incidents, government is "nothing more than a temporary submission to an intellectual or physical superior[.]" *Id.*

The formal adoption of the flag in 1775 showed more than an interest in a patriotic symbol; it shows a sovereignty interest, since, as historians note, the nascent American navy required a flag to avoid treatment of its seamen as pirates.[7] In so acting, the Framers drew on an established history, for as this Court recently noted, flag requirements had been taken throughout the colonial period as legal indicia of sovereignty, *United States* v. *Maine*, 475 U.S. 89, 97 n.11 (1986) (recounting history of the 1600s and 1700s), apart from patriotic symbolism. On four different occasions, James Madison, draftsman of the First Amendment, recognized and sustained the legitimacy of the sovereignty interest in protecting the flag.[8] As Judge Bork recited regarding an 1802 incident, with a pronouncement by Madison:

> Thus, the tearing down in Philadelphia in 1802 of the flag of the Spanish minister, "with the most aggravating insults," was considered actionable in the Pennsylvania courts as a violation of the law of nations. 4 J. Moore, *Digest of International Law* 627 (1906) (*quoting* letter from Secretary of State Madison to Governor McKean (May 11, 1802)).

[7] B.W. Tuchman, *The First Salute* 47 (2988); *Texas* v. *Johnson*, 109 S. Ct. at 2549 (Rehnquist, J., dissenting).

[8] The lengthy source material on this point are appended to the brief of the House Amici Curiae in the district court.

*Finzer* v. *Barry*, 798 F.2d 1450, 1456 (D.C. Cir. 1986), *aff'd in part and rev'd in part on other grounds, Boos* v. *Barry*, 485 U.S. 312 (1988).

*Texas* v. *Johnson*, in surveying prior flag precedents, confirmed as good law *Halter* v. *Nebraska*, 205 U.S. 34 (1907), which upheld a prosecution for misuse of the flag. 109 S. Ct. at 2545 n.10 (distinguishing *Halter* as "not to the contrary" of *Texas* v. *Johnson*). *Halter* v. *Nebraska* explicitly recognizes the legitimacy of the sovereignty interest, noting approvingly the flag's role as an instrument of "national sovereignty," how the flag related to "the existence and sovereignty of the Nation," and how it "has often occurred that insults to a flag have been the cause of war, and indignities put upon it . . . [are] sometimes punished on the spot." 205 U.S. at 41. House *amici's* fuller recitation of the Framer's original intent regarding the sovereignty interest should await briefing on the merits; at this time, it suffices that even the district court acknowledged that "the House recounts the history of the use of the United States flag as an indicator of sovereignty, including numerous instances in which violations of the flag's physical integrity have been deemed threats to the sovereignty of this nation." Slip op. at 12.

As the Eighth Circuit soundly noted in recently upholding Cary's flagburning conviction, a "conviction [can be] based upon a federal statute which, unlike its Texas counterpart, does not require as an element of the crime that his expressive conduct offend third parties. Furthermore, there is no evidence in the record that anyone on the scene was even offended by Cary's actions or his message." *Cary*, slip op. at 12. *Texas* v. *Johnson* premised the striking down of Texas's provisions on Texas's fatally flawed quest to create "a determinate range of meanings [for the flag], Brief for Petitioner [Texas] 20–24," 109 S. Ct. at 2544. Congress had no such quest. The Flag Protection Act of 1989 includes no test of whether defendants "seriously offend" others, contemplates no evidence as to what defendants meant or whether they offended some audience, and in no other way incorporates any ideological tests.



As the Eighth Circuit properly concluded, "the government's interest . . . on these facts is not related to suppressing debate or disputes between opponents nor does it offend the First Amendment's high purpose . . . ." *Id.* Nothing in *Texas* v. *Johnson* supports the opposite conclusion of the *Haggerty* district court, necessitating a constitutional amendment for any flag protection, that "even if Congress does seek to prevent harm to the flag as an incident of sovereignty," nevertheless, "that interest relates to the suppression of expression." Slip op. at 13.

## CONCLUSION

The Court should note probable jurisdiction of this appeal.

Respectfully submitted,

STEVEN R. ROSS
*General Counsel to the Clerk*
CHARLES TIEFER
*Deputy General Counsel to the Clerk*
MICHAEL L. MURRAY
*Senior Assistant Counsel to the Clerk*
JANINA JARUZELSKI
*Assistant Counsel to the Clerk*
ROBERT MICHAEL LONG
*Assistant Counsel to the Clerk*
*The Capitol, H–112*
*Washington, D.C. 20515*
*(202) 225–9700*
*Attorneys for Speaker and Leadership Group of the House of Representatives.*

MARCH 1990